

NOTICE OF HEARING

Health and Family Services **(Health, Chs. 110-)**

Notice is hereby given that pursuant to ss. 227.16 (1), 227.17 and 227.18, Stats., the Department of Health and Family Services will hold a public hearing to consider the proposed amendment of sections HFS 117.01 to 117.04 and the repeal and recreation of section HFS 117.05, relating to fees for copies of health care records.

Hearing Information

The public hearing will be held:

<u>Date & Time</u>	<u>Location</u>
December 15, 2003 Monday 9:00 a.m.	Room 751 1 West Wilson St. Madison, WI

The hearing site is fully accessible to people with disabilities.

Analysis Prepared by the Department of Health and Family Services

Section 146.83 (3m), Stats., as created by 2001 Wisconsin Act 109 and s. 908.03 (6m) (d), Stats., as amended by 2001 Wisconsin Act 109, requires the Department prescribe by rule fees for reproducing patient health care records that are the maximum amount a health care provider may charge. The fee limits are to be based on an approximation of actual costs. The statutes allow health care providers to also charge for postage or other delivery costs.

To develop these rules, the Department formed a 14-member advisory committee in early February, 2003. The committee consisted of equal representation of those who maintain health care records and those who request records. Over the following three months, the Department also created a website on which it posted pertinent documents for review by interested parties and encouraged persons to register to receive email notifications of new Department postings on the website.

The Department began its effort by distributing a four-page project plan to advisory committee members on February 18th. The plan stated the Department's intent "to develop a rule that complies and is consistent with what it believes to be applicable state and federal law, and is based on an approximation of actual medical record reproduction costs." Toward that end, the Department identified and shared what it considered to be the major factors and considerations. These were:

1. The recent federal Health Insurance Portability and Accountability Act (HIPAA) regulations and federal commentary related thereto, particularly the issues of:
 - a. Who, and the circumstances under which, a person will be considered someone's "personal representative" for the purposes of requesting a copy of that person's health care record; and
 - b. Whether the costs associated with record retrieval should be included in fee limits for subject persons or their personal representatives.

2. The Department's desire to approximate total health care record reproduction costs by attempting to identify the component tasks and estimated costs associated with health care record reproduction. Issues bearing on doing so include the following:

- a. Whether and how the health care record medium affects the length of time to reproduce a record;
- b. Whether the health care provider setting (i.e., hospital, clinic, etc.) or subject patient group (e.g., children, elderly, etc.) affects the time and effort needed to reproduce records; and
- c. The steps involved in reproducing health care records and whether those steps are different for different record mediums and record maintainer settings.

The Department invited all committee members, and those who were "virtual" participants via the Department's website postings, to submit documents to the Department on these major factors and considerations, asking that the documents be submitted, if possible, by March 7th. Specifically, the Department requested the following input:

1. Committee members' thoughts regarding the appropriateness and acceptability of the Department's intended approach and, if it is not, how it is not, and how and why the commenter would propose it to be different.

2. Information on the following subjects:

- How HIPAA bears on the revision of ch. HFS 117.
- Whether the categories of paper, electronic, microfilm, microfiche and traditional x-ray comprise the universe of health care record mediums for the purposes of this project, and if not, what other mediums should be addressed.
- Whether the steps involved in the reproduction of health care records within a particular health care record maintainer setting or for a particular patient group are sufficiently different to suggest a significantly different reproduction cost.
- The sequence of steps and time associated with each step typically required for health care record reproduction, by health care record medium, setting or patient group, as appropriate.
- Existing health care record fee limit policies.

After reviewing, analyzing and compiling information from about 20 documents, the Department circulated a preliminary report to committee members on March 31, 2003. The preliminary report included an initial draft of ch. HFS 117, as did the Department's subsequent iterations of the report. The Department asked that committee members and others submit comments on the Department's preliminary report by April 14th.

In response to comments it received on its preliminary report, the Department revised its preliminary report (known in its second iteration as the "interim" report) and created a table of comments and Department responses. The Department subsequently modified the comment and response table to reflect comments the Department received through April 30th. The Department circulated these documents to committee members prior to convening the first and only meeting of the advisory committee on April 25th.

In the course of the advisory committee meeting, a variety of outstanding issues were discussed. However, with one exception, there was virtually no consensus on any of the issues between members representing health care record maintainers and members representing health

care record requesters. The one exception was that members encouraged the Department to develop a single fee structure to the extent possible.

Following the April 25th advisory committee meeting, the Department chose its positions on the remaining outstanding issues, revised its interim report to become its “final” report, and created a “final” iteration of its comment and response table. This initial proposed rulemaking order is the result of these efforts.

The rules limit the fee a health care provider may charge to provide duplicate health care records. The proposed fee limit varies depending on the person making the request and, in some cases, the resultant number of copies generated by the request. If an individual (or the individual’s personal representative on behalf of the individual) is requesting his or her own records, the provider may charge no more than \$0.31 per page. Postage is extra. If a person is requesting another’s records, the provider may charge no more than \$12.50 per request if the request generates less than five copies plus \$0.31 per page. The provider may charge no more than \$15.00 per request if the request generates five or more copies plus \$0.31 per page. The \$12.50 and \$15.00 amounts may be deemed a retrieval fee that individuals need not pay for copies of their own records.

For More Information

The Department posts information about each emergency rule and each proposed permanent rule it promulgates on its website at <http://adminrules.wisconsin.gov>. At this website, you can view documents associated with this rule’s promulgation, register to receive email notification whenever the Department posts new information about this rulemaking and, during the public comment period, you can submit comments on the rulemaking order and view comments that others have submitted about the rule.

If you do not have Internet access and would like to find out more about the hearing or to request a copy of the proposed rules, please contact:

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If you are hearing or visually impaired, do not speak English, or have circumstances that might make communication at a hearing difficult and if you, therefore, require an interpreter or a non-English, large print or taped version of the hearing document, contact the person at the address or phone number given above at least 10 days before the hearing. With less than 10 days notice, an interpreter may not be available.

Deadline for Comment Submission

Written comments for this rule that are submitted using the Department’s website or which the Department receives by mail or email at the above address no later than **5:00pm, December 30, 2003**, will be given the same consideration as testimony presented at the hearing.

Fiscal estimate

The Department estimates that the proposed rules will increase costs and affect GPR and FED funding sources. Costs incurred by counties and tribes may also be affected.

Section 146.83 (3m), Stats., as created by 2001 Wisconsin Act 109 and s. 908.03 (6m) (d), Stats., as amended by 2001 Wisconsin Act 109, requires the Department prescribe by rule fees for reproducing patient medical records that are the maximum amount a health care provider may charge. The fee limits are to be based on an approximation of actual costs. The statutes allow health care providers to also charge for postage or other delivery costs.

Fee limits proposed in the rules are the Department's approximation of the total cost (retrieval, processing and copying) of reproducing medical records for persons other than the subject of the records when the records are requested by a person other than the subject of the record. That limit is either \$12.50 or \$15.00 per request plus \$0.31 per page. A second fee limit in the rules are the Department's approximation of the cost of copying records only (not including retrieval and processing costs) applicable to requests made by persons who are the subject of the requested records. That limit is \$0.31 per page. The rules also specify a limit on what a health care provider may charge for certifying a record.

The fee limits apply to all persons and entities who request duplicate health care records under 146.83 and 908.03 (6m) (c) 3., Stats., and to all health care providers who supply those records, unless superceded by fees established by other applicable law. Such covered persons and entities include W-2 agencies, county district attorneys and corporation counsels and also state agencies **not** governed by other fee limits or fee scales.

The Disability Determination Bureau within DHFS routinely requests large volumes of medical records to adjudicate disability claims for the Social Security disability, Supplemental Security Income (SSI) and Medicaid disability programs. Under those programs, the Bureau expects 180,000 record request to be made in 2004. The average request generates 26 pages. The Department's Disability Determination Bureau (DDB) currently receives from the Social Security Administration (SSA) a maximum reimbursement of \$20 per record request for SSI applications, regardless of the number of pages requested or supplied. Payments for SSI-related record requests are estimated to total \$3.1 million in 2004. If all health care providers were to maximize their fee income by charging the amount in the proposed rule the Bureau would require an additional \$465,000 in annual federal funding from SSA. Currently, the federal funding for DDB is through a federal block grant. It is uncertain whether the federal allocation would be increased for an increase in expenditures. If the block grant is not increased, DDB would have to fund increased costs using existing federal or state resources.

DDB expects record request costs for Medicaid (MA) disability programs to total \$190,000 in 2004. Increased costs for records requested under MA disability programs would be incurred by the MA program. The proposed change could increase MA costs by \$218,500 AF (\$109,300 GPR) annually.

The other state programs that might be expected to request medical records are Food Stamp Certification, Worker's Compensation, W-2 Transitions, and Vocational Rehabilitation. The Worker's Compensation program will not be affected under this rule change. It operates under its own fee limits established in s. 102.13 (2) (b), Stats. and is therefore exempt from this rule. The Vocational Rehabilitation program, administered by the Department of Workforce Development, uses medical records in vocational assessments. The proposed increase in allowable medical

record fees could increase DWD Division of Vocational Rehabilitation costs by \$230,000 AF (\$49,000 GPR) annually.

The W-2 Transitions and Food Stamp Certification programs are state programs administered by local agencies, including county and tribal run agencies. Local agencies request medical records to identify utilization of medical services by W-2 applicants and establish exemptions from food stamp work requirements. Costs for record requests are reimbursed with other administrative costs within set contract amounts provided to local agencies. Local agencies' W-2 costs are reimbursed through the W-2 contract, which is administered by DWD. County agency food stamp administrative costs are reimbursed through the Income Maintenance contract, administered by DHFS. The proposed increase in allowable medical record fees could increase costs for local agencies if contract amounts were not increased. Since medical record request costs are not reported under the W-2 and IM contracts as a separate cost items, increased costs to counties and tribes under this proposed change cannot be estimated.

Other possible increased costs to local units of government due the proposed change are unknown.

Initial Regulatory Flexibility Analysis

When an agency, such the Department, proposes a rule that may have an effect on small businesses (defined as entities that are independently owned and operated and not dominant in their field, and employ fewer than 25 full-time employees or have gross annual sales of less than \$2.5 million), section 227.114, Stats., requires that agency to consider several methods for reducing the effect of the proposed rule on those small businesses. The revision of ch. HFS 117 will affect many small businesses, principally law firms that request health care records on behalf of clients, and small health provider offices that maintain and supply their patients' health care records to those authorized to request those records. The fee limits specified in ch. HFS 117 also will effect a small number of businesses that reproduce medical records on behalf of health care providers and transmit those records to authorized record requesters.

Chapter HFS 117 does not require compliance with any reporting, bookkeeping or other procedures. Nor does the proposed rule impose new requirements for professional skills that are not currently required to comply with requests for copies of health care records. Given that the proposed rules do not require reporting, bookkeeping or other procedures and skills, the question of exempting particular small businesses from some or all of HFS 117's provisions is moot.

The Department also cannot estimate the effect of the proposed rule on the above small businesses other than to note that the fee limits the Department proposes to specify in HFS 117 are higher than those specified in the existing HFS 117 rules. The Department believes that exempting certain law firms and health care providers from the rule's applicability would be contrary to the legislature's intent that the rule, to the extent possible, specify a single fee limit for all parties. Similarly, the Department believes that specifying a lower fee limit for particular law firms (or a higher fee limit for particular health care providers) would also be contrary to legislative intent.